

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS HENRY, et al. : CIVIL ACTION
:
v. :
:
DELAWARE RIVER JOINT :
TOLL BRIDGE COMMISSION , et al. : NO. 00-6415

MEMORANDUM AND ORDER

McLAUGHLIN, J.

August 24, 2001

Before the Court is the motion of defendants Delaware River Joint Toll Bridge Commission ("Bridge Commission") and Harry Parkin to disqualify Charles A. Ercole, Esq. and the law firm of Klehr, Harrison, Harvey, Branzberg & Ellers, LLC ("Klehr Harrison"), as counsel for plaintiffs Thomas Henry and Margaret Henry. Because the Court finds that conflicts of interest are present that require disqualification of plaintiffs' counsel, it will grant the motion.

I. Background

The plaintiffs in this case are Thomas Henry, a retired former employee of the Bridge Commission, and his dependent mother, Margaret Henry.¹ The defendants are the Bridge Commission, a public body created by the Commonwealth of Pennsylvania and the State of New Jersey to operate and maintain

1. Unless otherwise stated, all facts are taken from the plaintiffs' response to the defendants' motion to disqualify plaintiffs' counsel.

certain bridges over the Delaware River, and the Executive Director of the Bridge Commission, Harry Parkin.

Since Thomas Henry's retirement from the Bridge Commission in 1993, Margaret Henry has received health insurance benefits as a dependent parent eligible for coverage under the Commission's health insurance plan. On April 24, 2000, the defendants removed all parents from the definition of dependents eligible for coverage under the plan. Accordingly, Margaret Henry's benefits were terminated on May 31, 2000. The plaintiffs then filed this lawsuit, claiming that the termination of dependent parent eligibility deprived the plaintiffs of their due process rights. The plaintiffs also claim that the termination of benefits was not motivated by a legitimate governmental interest, but rather, by the defendants' bias, personal animus, partisanship, bad faith, and political animus.

The plaintiffs' counsel, Charles A. Ercole of Klehr Harrison, previously worked as an associate at the law firm of Montgomery, McCracken, Walker & Rhoads, LLP ("Montgomery McCracken"). While at Montgomery McCracken, Mr. Ercole represented the Bridge Commission from approximately September of 1993 until March of 1996. In April of 1999, Mr. Ercole left Montgomery McCracken and began practicing at Klehr Harrison.

II. Standard for a Motion to Disqualify

Federal courts have the inherent power to supervise the conduct of attorneys practicing before them. See In re Corn Derivatives Antitrust Litig., 748 F.2d 157, 160 (3d Cir. 1984). Accordingly, the United States District Court for the Eastern District of Pennsylvania has adopted the Pennsylvania Rules of Professional Conduct to govern attorneys appearing before it. See E.D. Pa. Local R. Civ. P. 83.6, Part IV(B). One of the methods used to enforce these Rules is the disqualification of counsel. Counsel may be disqualified if the Court determines, on the facts of the particular case, that disqualification is an appropriate means of enforcing the applicable disciplinary rule, given the ends that the disciplinary rule is designed to serve. United States v. Miller, 624 F.2d 1198, 1201 (3d Cir. 1980).

In determining whether disqualification is appropriate, the Court must also consider countervailing policies, such as permitting a litigant to retain his chosen counsel and enabling attorneys to practice without excessive restrictions. Id. The party seeking disqualification bears the burden of showing that the representation is impermissible. In re Rite Aid Corp. Sec. Litig., 139 F. Supp. 2d 649, 656 (E.D. Pa. 2001). Any doubts regarding the existence of a violation of an ethical rule should be construed in favor of disqualification. See Int'l Bus. Mach. Corp. v. Levin, 579 F.2d 271, 283 (3d Cir. 1978); In re Rite Aid

Corp., 139 F. Supp. 2d at 656; Reading Anthracite Co. v. Lehigh Coal & Navig. Co., 771 F. Supp. 113, 115 (E.D. Pa. 1991).

III. Discussion

A. Rule 1.9(a) of the Rules of Professional Conduct

The defendants argue that Mr. Ercole has a conflict of interest under Rule 1.9(a) of the Pennsylvania Rules of Professional Conduct because he previously represented the Bridge Commission when he worked at Montgomery McCracken.² Rule 1.9(a) provides as follows:

A lawyer who has formerly represented a client in a matter shall not thereafter: (a) represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after a full disclosure of the circumstances and consultation.

An analysis of a potential violation of Rule 1.9(a) focuses on whether the prior and present matters are substantially related, whether the clients have materially adverse interests, and whether the clients consent after consultation. See U.S. v. Moscony, 927 F.2d 742, 749 (3d Cir. 1991); James v. Teleflex, Inc., 1999 WL 98559, at *3 (E.D. Pa. Feb. 24, 1999). In this case, the Bridge Commission did not consent to Mr. Ercole's representation of the plaintiffs, and the plaintiffs concede that

2. The plaintiffs concede that if Mr. Ercole is disqualified to represent them, the conflict of interest is imputed to Klehr Harrison under Rule 1.10 of the Pennsylvania Rules of Professional Conduct. Pl. Resp. at 9.

their interests are materially adverse to those of the Bridge Commission. See McCartney Decl., D. Ex. 1, at ¶¶ 48-49³; Pl. Resp. at 9. The issue is whether Mr. Ercole's former representation of the defendants is "substantially related" to his current representation of the plaintiffs.

In determining the presence of a "substantial relationship," a court should consider the following three factors: (1) the nature of the present lawsuit against the former client; (2) the nature and scope of the prior representation at issue; and (3) whether in the course of the prior representation, the client might have disclosed to its attorney confidences which could be relevant or possibly detrimental to the former client in the present action. See Brennan v. Independence Blue Cross, 949 F. Supp. 305, 308 (E.D. Pa. 1996); Commonwealth Ins. Co. v. Graphix Hot Line, Inc., 808 F. Supp. 1200, 1204-05 (E.D. Pa. 1992); see also Borges v. Our Lady of the Sea Corp., 935 F.2d 436, 439-40 (1st Cir. 1991). The Court will begin by discussing the first factor, and then, as a matter of convenience, will turn to the second and third factors and consider them together.

1. Factor 1: Nature of the Present Lawsuit

3. Exhibits attached to the defendants' reply shall be referred to as "D. Ex.," followed by the exhibit number. Exhibits attached to the McCartney Declaration, D. Ex. 1, shall be referred to as "D. Ex. 1-," followed by the exhibit letter.

The plaintiffs have brought this case under 42 U.S.C. § 1983, claiming that the Bridge Commission's termination of dependent parent coverage under its health insurance plan deprived the plaintiffs of their due process rights under the Fourteenth Amendment to the United States Constitution. The parties agree that the present lawsuit includes the following issues: a public employee's property interest in aspects of employment and substantive due process; the ability of a public employer to make employment decisions based upon employees' political affiliations; the modification by an employer of health insurance coverage; the modification by an employer of post-retirement health benefits; and choice of law. McCartney Decl., D. Ex. 1, at ¶ 25; Transcript of Hearing dated Apr. 12, 2001, at 7-8, 10-11, 13-14, 21.

2. Factors 2 & 3: Nature and Scope of the Prior Representation & Potential Disclosure of Confidences

Factors two and three require the court to consider both (a) the nature and scope of Mr. Ercole's prior representation of the Bridge Commission and Mr. Parkin,⁴ and (b)

4. It should be noted that the defendant Mr. Parkin was a member of the Bridge Commission during Mr. Ercole's tenure as labor counsel. Mr. Ercole has admitted to working directly with Mr. Parkin during that time. Tr. at 6-7. In addition, of the ten members of the Bridge Commission in April of 1999 (the date of
(continued...)

whether in the scope of that representation, Mr. Ercole "might have acquired" confidences from the Bridge Commission that could be relevant to issues in the present lawsuit. Oyster v. Bell Asbestos Mines, 568 F. Supp. 80, 81 (E.D. Pa. 1983).

As general labor counsel to the Bridge Commission, Mr. Ercole represented the Commission in connection with various employment law matters, from sexual harassment to wrongful discharge. McCartney Decl., D. Ex. 1, at ¶¶ 19, 39, 44; Tr. at 5. In particular, Mr. Ercole's work included the revision of the Bridge Commission's Employee's Manual, general legal advice on employment law issues, representation in connection with employee disputes, and attendance and participation at public meetings and executive sessions.

The Court finds that the nature and scope of Mr. Ercole's prior relationship with the Bridge Commission is substantially related to the nature and scope of his present relationship to the plaintiffs. The Court also finds that during his representation of the Bridge Commission, Mr. Ercole might well have acquired confidences that could be relevant in the instant case.

a. Employee's Manual

(...continued)
the modification at issue in this case), six had served during Mr. Ercole's time. McCartney Decl., D. Ex. 1, at ¶ 24.

In 1995, Mr. Ercole was involved in the review and revision of the Bridge Commission's Employee's Manual. The Employee's Manual represents the Commission's policies on a wide range of employment-related topics, such as hiring, compensation and benefits, and ethics. See 1996 Employee's Manual, D. Ex. 1-M.

The revised Employee's Manual became effective on January 1, 1996. McCartney Decl., D. Ex. 1, at ¶ 35. A comparison between the January 1, 1996 version and the previous version (which was effective starting in 1991) reveals several changes in the Bridge Commission's policies that could affect employees' substantive rights. For example, the 1996 version's description of the Commission's health and life insurance program was amended to include the following statement: "The Commission reserves the right to amend, modify or terminate any of these plans at any time by written action of the Commission. . . ." See 1996 Employee's Manual at 36, D. Ex. 1-M. In addition, the following statement from the 1991 version was removed: "Many other benefits established by the Commission over the years will also be available to you and your dependents for the rest of your life." See 1991 Employee's Manual at 24, D. Ex. 1-N.

These changes are likely to be relevant to this case. A central issue will be whether the Bridge Commission had the right, in 2000, to change the retirement benefits that Mr. Henry

and his mother had been receiving since his retirement in 1993. The Bridge Commission has said that it will rely on the revised language of the 1996 Manual – part of the language drafted by Mr. Ercole – to support its claim of right in revising the benefit options available to Mr. Henry. See Tr. at 31-32.

Mr. Ercole argues that these revisions are not at issue in the present case because: (a) Mr. Henry, in making his decision to retire, relied on the 1991 Employee's Manual, a document in existence prior to any involvement by Mr. Ercole; and, (b) the Bridge Commission made their decision to change available retirement benefits in 2000, after Mr. Ercole and Montgomery McCracken had ceased representing the Commission. See Tr. at 38.

This argument falls short in two respects. First, it does not account for the fact that the language allegedly relied on by Mr. Henry was eliminated during the process of revising the document under Mr. Ercole's watch. Second, it fails to realize that in supporting their decision to amend the benefits available to retired employees in 2000, the Bridge Commission will rely on the modified language of the 1996 Manual that Mr. Ercole helped draft. Mr. Ercole's work in revising the Employee's Manual is, therefore, substantially related to the present litigation. Through that work, Mr. Ercole may have been exposed to relevant confidential information regarding the Employee's Manual.

b. General Legal Advice

During the course of his relationship with the Bridge Commission, Mr. Ercole provided legal advice on a variety of employment law issues, from alcohol and drug testing to affirmative action. Tr. at 38; McCartney Decl., P. Ex. 1, at ¶ 45 and D. Exs. 1-R & 1-U. On several occasions, Mr. Ercole provided advice that is related to issues in this case.

In April of 1995, Mr. Ercole sent a four-page opinion letter to the Bridge Commission regarding two Supreme Court decisions, Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), and Rutan v. Republican Party of Illinois, 497 U.S. 62 (1992). In this letter, Mr. Ercole discussed the holdings of Rutan and Loudermill, both of which concerned a public employer's ability to make certain types of employment decisions. Rutan applied to decisions based upon political affiliations; Loudermill applied to decisions affecting an employee's property right in employment. Although Mr. Ercole's letter did not comment on any specific practices of the Bridge Commission, it analyzed the general application of these cases to the defendants. McCartney Decl., D. Ex. 1, at ¶¶ 26-28 and D. Ex. 1-F; Tr. at 9, 11.

Mr. Ercole concedes that Rutan is implicated in this case, but maintains that Loudermill is not. Tr. at 7-11. He argues that Loudermill involved property rights in employment,

while this case involves property rights in post-retirement benefits. Despite this distinction, the Court finds that Mr. Ercole's discussion of Loudermill with the Bridge Commission presents cause for concern. Loudermill involved the ability of a public employer to take actions that would deprive an employee of a property interest; this issue may be before the Court in the present case. Thus, the 1995 opinion letter demonstrates that issues present in this case are related to issues that were discussed between Mr. Ercole and the Bridge Commission.

c. Employee Disputes

Mr. Ercole represented the Bridge Commission in a number of disputes with individual employees. One of these disputes involved a retired employee who, like the plaintiffs in this case, asserted a claim for post-retirement health benefits. McCartney Decl., D. Ex. 1, at ¶ 33 and D. Ex. 1-K. Although the extent of Mr. Ercole's participation in that case is unknown, it is clear that he was involved at least to the extent of receiving confidential communications from the Bridge Commission and attending at least one meeting where the retiree's claim was discussed. See Tr. at 18-20.

Mr. Ercole also represented the Bridge Commission in a lawsuit filed by a former employee who claimed that his due process rights were violated when he was wrongfully discharged. Kroesen v. Del. River Joint Toll Bridge Comm'n, Civ. No. 95-CV-

2628 (D.N.J. 1995). The Kroesen plaintiff, like Mr. Henry, claimed that the Bridge Commission had breached an employment contract arising out of the Employee's Manual, which Mr. Ercole would later help revise. McCartney Decl., D. Ex. 1, at ¶ 39 and D. Ex. 1-0. In defending the Kroesen lawsuit, Mr. Ercole would have had to formulate a strategy with the Bridge Commission with respect to whether the Employee's Manual constitutes a contract. The present case would require Mr. Ercole to formulate a strategy opposing the Bridge Commission on the very issue that he once defended. It is likely that during the course of this lawsuit, Mr. Ercole received confidences that could be used to the detriment of the Bridge Commission in this case.

d. Attendance at Meetings

As general labor counsel for the Bridge Commission, Mr. Ercole attended and participated in the Bridge Commission's monthly meetings. These meetings addressed topics such as personnel, labor and employment, finances, funding, projects, equipment, insurance, public relations, training and safety, and professional services. McCartney Decl., D. Ex. 1, at ¶ 6. They consisted of a public portion and an executive session which was closed to the public. McCartney Decl., D. Ex. 1, at ¶ 7. The Bridge Commission often addressed confidential topics in the executive sessions, such as litigation strategy, negotiations, and other personnel and employment-related issues. Because the

executive sessions were closed to the public, the members of the Bridge Commission were freer to discuss their philosophies, their concerns regarding litigation strategy, any settlement issues, and other employee-related issues. McCartney Decl., D. Ex. 1, at ¶ 10; Tr. at 4.

Mr. Ercole attended almost all of the Bridge Commission's monthly meetings from December of 1994 to January of 1996. McCartney Decl., D. Ex. 1, at ¶ 21; see, e.g., Minutes of meeting dated 3/28/95 at 2, D. Ex. 1-J; Minutes of meeting dated 8/29/95 at 2, D. Ex. 1-E. Many of these meetings addressed issues that are related to this case. For example, one of the meetings attended by Mr. Ercole resulted in a change to the formula used for determining post-retirement health benefits. At another, the Bridge Commission discussed certain revisions to the Employee's Manual. At these meetings, Mr. Ercole also discussed the status of litigation and other employment-related matters with the Bridge Commission, and was instructed at times whether and when to settle litigation. See McCartney Decl., D. Ex. 1, at ¶ 31 and D. Exs. 1-I & 1-J at 3-4.

Particularly troubling to the Court is the fact that Mr. Henry pleads in his complaint that the benefits option changes implemented by the Bridge Commission in 2000 were motivated by "bias, personal animus, political affiliation, bad faith and other improper motives. . . ." Complaint at ¶ 52. The

broad nature of the work done for the Bridge Commission by Mr. Ercole suggests that confidences related to the relevant mental states of the Commission were communicated to Mr. Ercole in his role as attorney for the Commission. This seems particularly true with respect to the claim that the benefits options were changed to target Mr. Henry because of "Mr. Henry's political affiliation as a Democrat." See Complaint at ¶ 53. It is uncontroverted that Mr. Ercole advised the Bridge Commission on the Supreme Court's Rutan opinion dealing with an employer's right to target an employee for his/her political affiliation – an issue central to the plaintiffs' complaint. See Tr. at 10-11.

Because his prior and present representations of the parties are substantially related, the Court concludes that Mr. Ercole's representation of the plaintiffs is in violation of Rule 1.9(a) of the Rules of Professional Conduct.

B. Balance of Interests

A finding that counsel is in violation of the Rules of Professional Conduct does not result in automatic disqualification. The Court must first determine whether disqualification will serve the purposes of Rule 1.9, such as the Bridge Commission's interest in attorney loyalty and the Court's interest in protecting the integrity of the proceedings and maintaining public confidence in the judicial system. These interests must be weighed against countervailing policies, such

as the plaintiffs' interest in retaining their chosen counsel, the risk of prejudice to the plaintiffs, and the public's interest in permitting attorneys to practice without excessive restrictions. See In re Corn Derivatives, 748 F.2d at 162; Miller, 624 F.2d at 1201.

The Court concludes that disqualification will serve the purposes of Rule 1.9. Mr. Ercole was publicly identified as the Bridge Commission's labor counsel, both in the Commission's monthly meetings and in litigation. To permit him to represent the plaintiffs against his former client in a matter so related to the prior representation would undermine the reputation of attorneys for loyalty and confidentiality to their clients.

The Bridge Commission's interest in attorney loyalty also calls for Mr. Ercole's disqualification. This case does not involve a personal injury claim or other such matter unrelated to Mr. Ercole's prior relationship with the Bridge Commission. Rather, this case involves employment relations, which was the subject of Mr. Ercole's former representation of the Bridge Commission. In addition, many of the same issues that arose while Mr. Ercole represented the Bridge Commission are present in this case.

The countervailing factors do not outweigh these important interests. No pretrial schedule has been set, no discovery has been conducted, no dispositive motions have been

filed, and no arbitration has been scheduled. The Court will allow the plaintiffs sufficient time to retain replacement counsel, and the plaintiffs' current counsel will be permitted to assist in the process of finding and transferring representation to replacement counsel. Thus, the risk of prejudice to the plaintiffs at this early stage in the proceedings is not so great as to outweigh the interests that favor disqualification.

Finally, while a party's right to counsel of its choice is important, as is the interest in permitting attorneys to practice without excessive restrictions, such considerations must yield to the ethical considerations that bear upon the integrity of the judicial process. See Brennan, 949 F. Supp. at 310. The Court concludes that the balance of factors weighs in favor of disqualification of Mr. Ercole in this case.

An appropriate Order follows.

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	:	
v.	:	
	:	
DELAWARE RIVER JOINT	:	
TOLL BRIDGE COMMISSION, et al.	:	NO. 00-6415

ORDER

AND NOW, this 24th day of August, 2001, upon consideration of Defendants' Motion to Disqualify Plaintiffs' Counsel (Docket # 6), and all responses thereto, and after oral argument, it is hereby ORDERED that the motion is GRANTED for the reasons given in the Memorandum of today's date.

IT IS FURTHER ORDERED that this case is STAYED until September 30, 2001 to allow Plaintiffs time to obtain replacement counsel and to allow replacement counsel to enter an appearance. Present counsel for Plaintiffs may remain counsel of record in this lawsuit until such time as replacement counsel is retained, may assist Plaintiffs in the process of retaining replacement counsel, and may assist the replacement counsel in the transfer of representation of the Plaintiffs in this case.

BY THE COURT:

MARY A. McLAUGHLIN, J